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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1903

INTERNATIONAL RAILWAYS OF CENTRAL AMERICA,
Petitioner,

v.

UNITED BRANDS COMPANY,
Respondent.

PETITIONER'S REPLY BRIEF

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Respondent's brief attempts to distract attention from the thrust and meaning of Petitioner's petition by claiming, *erroneously,* that the petition "presents only questions of fact" (20). In fact, the questions are bottomed on either (i) concurrent findings of fact or (ii) undisputed evidence which demonstrates "very obvious and exceptional error" in the decisions below (*Graver Tank & Mfg. Co.* v. *Linde Air Prod. Co.,* 336 U.S. 271, 275).

1. The first question—which relates to price-fixing by a monopolist—is premised on the *concurrent finding* that United threatened to abandon Tiquisate if IRCA did not reduce the "*Ripley* judgment required rate of $130 . . .

to $90".* The undisputed evidence (a *Ripley*-court finding) is that the $90 rate previously imposed on IRCA by United was "unfair and unconscionable" (8 AD2d at 318); the courts below did not find to the contrary. The threat was carried out by United's abandonment of Tiquisate in August 1964. The courts below assumed that United illegally monopolized shipments from Guatemala to the United States (Pet. p. 9); moreover, it was conclusively established (Pet. p. 41, fn.).

The Court of Appeals holding, relied upon by Respondent (15), that the "abandonment of 'an unprofitable and uncomfortable operation . . . cannot possibly be characterized as an act of monopolization' (13a)", misstates plaintiff's position—that the abandonment was, in substantial part, to carry out a monopolist's threat in price-fixing, and was, therefore, an exercise of monopoly power. It was error of law and "very obvious and exceptional error" for the courts below not to so hold and find (Pet. pp. 34-40). Arguendo, that a business is losing money does not excuse price-fixing by a monopolist, especially where United's own cutbacks for monopolistic purposes made its operation unprofitable (Pet. pp. 12-13, 11-12).

Moreover, contra Respondent (15) and the Courts below (see Pet. pp. 37-40, 41, fn.), it is immaterial whether United had the "intent and purpose" to exercise monopoly power or to "willfully monopolize", in *closing Tiquisate.***

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* The concurrent finding (8a):

> "Before and after February 16, 1961 United officials informed IRCA that unless the *Ripley* judgment required rate of $130 per banana carload was reduced to $90, the Tiquisate operations might have to be liquidated. IRCA refused to reduce the $130 *Ripley* decreed rate."

** The Court of Appeals also erred in requiring Petitioner to "establish the *deliberate and intentional* combination to refuse to deal" (16a); see *American Tobacco Co.*, 328 U.S., at 809-10, and *Paramount Pictures*, 334 U.S. 131. Contra Respondent (5, fn. 5), Petitioner contends United's concerted action with its wholly owned subsidiary is also a § 1 violation (Pet. pp. 2-4).

As this Court stated in *Griffith Amusement Co.*, 334 U.S., at 105:

> "It is, however, *not* always necessary to find a specific intent to restrain trade or to build a monopoly in order to find that the anti-trust laws have been violated. It is sufficient that a restraint of trade or monopoly *results* as a *consequence* of a *defendant's conduct* or *business arrangements* (citing cases). . . . To require a greater showing would *cripple* the Act. As stated in *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 432, '*no monopolist monopolizes unconscious of what he is doing.*' Specific intent in the sense in which the common law used the term is necessary only where the acts fall short of the *results* condemned by the Act."

See Rept. of the Atty. Gen.'s Natl Com. To Study The Antitrust Laws (3/31/55) p. 56.

2. The second question is premised on the undisputed evidence (and it was "very obvious and exceptional error" not to so find) that United's *additional* substantial motives in abandoning Tiquisate were the maintenance of monopoly in one relevant market and the elimination of 50% of a major competitive source in another revelant market (Pet. pp. 13-17, 40-43). Respondent's brief does not address itself to this evidence of motivation and concedes (8, fn. 8) that the Courts below "found it *unnecessary* to deal with other elements of the claim relating to definition and share of relevant market". The Courts below did not reach such motivation since they confused relevant market concepts (Pet. pp. 5, 42). The Court of Appeals suggestion that the United States might be the only relevant market since all bananas compete there (13a-14a, fn. 18), is erroneous as a matter of law. The authorities hold that separate sources of supply may constitute separate relevant markets. *Woods Exploration & Proc. Co.*, 438 F2d 1286 (C.A. 5); see *Mandeville Farms*, 334 U.S., at 236-

237; here Central America and Ecuador each were such trade relevant markets (Pet. pp. 42, 11, 15-16).•

The Petition shows that the "principal factor" in United's earnings decline was competition from Ecuador (Pet. p. 11) and *not* the prevalence of Panama disease, as the Courts below erroneously found and as contended by Respondent (9). Panama disease was endemic in good and bad profit years (Pet. p. 13, fn.).

Respondent's position (3), that United's motivation for abandoning Tiquisate was "solely" because of "agricultural and economic disadvantages of growing bananas" there, is predicated on a finding tainted by "very obvious and exceptional error". As our Petition shows, it is not reasonably disputable that the Tiquisate shutdown was motivated at least in substantial part by United's purpose to maintain its monopoly in Central America and to knock out 50% of its Ecuadorian competition (Pet. pp. 40-43, 13-17).

Respondent (10) does not meet the specific and critical undisputed facts stated in the Petition under the heading "United Did Not Seriously Attempt To Sell Tiquisate As A Going Concern To Others" (Pet. p. 21). United sought purchasers of the land who would undoubtedly plant cotton, which is contra United's assertion (10) that purchasers of the land "decided" after the purchase "to grow cotton." Respondent (10) does not mention the sales to United employees, that United tore up 90 miles of track at Tiquisate essential for banana shipments and removed irrigation equipment necessary to banana cultivation; thus it made certain that no one would grow bananas there.

Respondent ignores the specific facts set forth (Pet p. 21) demonstrating United's *failure* in November 1963 to

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• The Court of Appeals assumed that the banana import trade from western Guatemala to the United States was a relevant market (13a-14a, fn. 18).

respond affirmatively to a competitor's interest in the purchase of banana producing assets. Despite the fact that United would have realized substantially more by selling Tiquisate as a going concern, United opted for liquidation sales at salvage value (Pet. p. 17). The only United competitor who made an inquiry, in May 1963, was not furnished any written data covering production or operating costs of Tiquisate or any of United's excellent results with the Valery trials at Tiquisate (Pet. pp. 21-23). Moreover, United made no attempt to communicate with it after their preliminary meeting in May of 1963. The *only* evidence that any competitor "evinced a lack of interest in buying [Tiquisate] for legitimate reasons such as the agronomic problems at Tiquisate" (10), was based on an oral inquiry in the year *1960*, as testified to by Mr. Sunderland—clearly too remote to be material and relevant to events in *1963*.

Regarding Chalk as a purchaser, Respondent states (10-11) "the deal foundered through no fault of UF but because of Chalk's reluctance, his unreasonable demands and his inability to finance the purchase." But as United conceded below (in its main brief in the District Court, at p. 212), in accordance with the documentary proof (see Pet. p. 18), it was United that decided "to terminate the Chalk discussions . . ." This critical fact was overlooked by the courts below. The undisputed evidence is that Chalk had an independent means of financing the transaction by his controlled TCA Company which had an equity of over $8,000,000. Moreover, United never considered Chalk's demands to be unreasonable in 1963-1964 but in fact had a meting on January 9, 1964 to consider Chalk's letter offer of December 30, 1963 (Pet. p. 18). The undisputed documentary evidence shows that, contra Respondent (10), United considered said Chalk letter as an offer and shows that it was United that deliberately decided against selling to Chalk, and to abort the negotiations, for anticompetitive purposes (Pet. pp. 17-21). Respondent makes no attempt

to answer this evidence, also overlooked by the courts below. Clearly the courts below, in accepting the 10-year old self-serving declaration of Sunderland contrary to the contemporaneous documentary evidence, committed "very obvious and exceptional error."

3. The third question is premised on a combination of questions one and two (discussed above) and on the legal proposition that where there are mixed motives for abandoning a division, including (i) to enforce a threat in price fixing, (ii) to maintain a monopoly in a separate relevant market, (iii) to eliminate 50% of the competition in another relevant market and (iv) (arguendo) for legitimate business reasons, it was error of law for the courts below to excuse the *per se* antitrust violations on the ground that *one* of the motives was legitimate. (*Klor's*, 359 U.S. at 212, *Fashion Originator's Guild*, 312 U.S. at 468, and *U.S.* v. *Aluminum Co. of America*, 148 F2d at 428 (C.A. 2). Respondent does not challenge that classic legal principle.*

Respondent erroneously states (6): "as an alternative ground of dismissal, the trial court rejected Petitioner's claim of injury on the facts" on the first three questions in holding that the takeover of IRCA by the Guatemalan Government was due to acts not caused by United. Respondent overstates the District Court's holding. The District Court did not hold that there was no injury to IRCA resulting from United's restriction and then elimination of shipments from Tiquisate, but only that the Government mortgage foreclosure was not an element of the injury. The undisputed evidence was, based on the year 1960, that IRCA suffered injury of over $5,000,000 during the period

* Therefore, the Courts below committed error of law in considering the mass of economic and agronomic evidence to determine whether there was a legitimate business reason for the abandonment of Tiquisate. Respondent does *not* point to any specific facts, as being erroneous, in plaintiff's overwhelming showing that, arguendo, it was "very obvious and exceptional error" to find that Tiquisate was the worst place to grow Valerys (Pet. pp. 21-28).

1961 through 1968 before the Government take-over, because of United's restriction and elimination of such shipments.* The uncontested evidence also demonstrated that by reason of United's unlawful cutback and elimination of shipments, IRCA incurred other damages, such as the requirement of making approximately $2,000,000 in severance payments to employees and maintaining a capacity in personnel and physical plant and equipment far beyond its needs.

4. The fourth question is premised on equipment and other predatory preferences in United. Respondent contends (3) that this question "assumes that UF exacted preferences from IRCA in the operation of its railroad to control competitive shipments" and the facts are "to the contrary". Respondent has overlooked the findings of the District Court and the Court of Appeals affirming such preferential treatment; see Pet. pp. 29-34.

The Court of Appeals acknowledged that the District Court had overlooked the fact that United's equipment preference from IRCA, by contract, continued until 1968 (25a) and assumed that the District Court intended to find, as stated in its opinion** (25a), that "there is no doubt that CAG was given preferential treatment over Standard in the transportation of bananas from the West Coast."

Under the circumstances, the Court of Appeals conclusion, relied upon by Respondent (3), that (26a):

> "it cannot be argued *reasonably* that UF-CAG through coercive means or by insistence on contract terms was demanding preferential treatment."

* But for United's antitrust violations, United's subsidiary (CAG) would have continued to ship over IRCA at least at the 1960 volume of 17,559 cars per year. In addition, there would have been no need to borrow from the Guatemalan government and thus no foreclosure.

** The District Court also made an inconsistent, separate finding on this vital issue (25a).

is error of law or, if a fact found, is arbitrary, glaring and exceptional error, devoid of reasonableness, and a complete non-sequitur from the underlying concurrent finding of fact. Whether United insisted on requiring IRCA to live up to the contract terms is immaterial, once United coerced such contract terms from IRCA through its control and "United was given preferential treatment over Standard" in practice in the pre-statutory and statutory periods.

Respondent does not attempt to answer the showing in the Petition that there were also other specific significant areas of discrimination, to wit, the wharfage charges at Barrios and United's almost exclusive berthing privileges on the north side of the Barrios pier (Pet. pp. 33-34).

Respondent relies (7, 16) on the district court's finding (47a) that because United's preferential allocation of banana cars never caused Standard to miss a cutting or a ship, neither Standard nor IRCA suffered any damage. That ignores the thrust of petitioner's claim—that Standard was relegated to a shipping position "inferior to that" of its dominant competitor, United, and as a matter of economic reality necessarily limited its production and shipment to a level which it knew United sanctioned (Pet. p. 45). Moreover, Respondent does not dispute Petitioner's showing that Standard did in fact expand in other Central American countries and that other shippers went to more distant sources of supply to ship bananas to the United States (Pet. pp. 32-33); it was "very obvious and exceptional error" not to so find.

As a matter of law, United's antitrust violations "necessarily had an impact on [plaintiff] and constituted an injury to its businesss" under *Zenith Corp.* v. *Hazeltine,* 395 U.S. 100, 120 (Pet. pp. 3, 43-46). Respondent does not cite any authorities to challenge that legal proposition.

Respondent does not address itself to Petitioner's claim that damages also occurred in the statutory period from Respondent's antitrust violations in the pre-statutory period (Pet. p. 46).

5. The fifth question relates to whether Circuit Judge Mulligan should have disqualified himself from sitting on the appeal. Respondent (16-19) ignores the significant fact that Touro Law School was representing to the State of New York Education Department, more than one month *after* the date of the claimed resignation, that Judge Mulligan was still a member of its Board of Visitors (93a-95a, 99a). Resolution of that disputed fact would have required a collateral investigation and proceeding. Accordingly, this was part of "all the circumstances" under which Judge Mulligan's "impartiality might reasonably be questioned." Moreover, Respondent overlooks the fact that the claimed disqualification was made well *before* the selection of the Panel to hear the appeal in this case.

6. Respondent does not address itself to Petitioner's legal position that the antitrust laws "cannot 'be evaded by good motives' " (*Thomsen,* 243 U.S., at 85, Pet. p. 30). The Courts below overlooked that legal proposition in accepting the "sincerity" of United's witnesses on the issue of motivation (18a, 52a). Moreover, United's witnesses "could not have been speaking the truth, no matter how transparently reliable and honest they . . . appeared" (*Aluminum Co. of America, supra,* at 433, Pet. p. 25) where their 10-year old recollections are directly contrary to contemporaneous documentary evidence. Respondent (13) accuses Petitioner of "name calling" but does *not* specify any error in Petitioner's charges of antitrust wrongdoing by United's witnesses (Pet. p. 49).

CONCLUSION

The Petition for certiorari should be granted.

Respectfully submitted,

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